



**Hakika Transport Services Limited & another v Maghema & 2 others (Civil Appeal 38 of 2016) [2023] KEHC 22227 (KLR) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 22227 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 38 OF 2016  
F WANGARI, J  
JUNE 16, 2023**

**BETWEEN**

**HAKIKA TRANSPORT SERVICES LIMITED ..... 1<sup>ST</sup> APPELLANT**

**STEPHEN CHEPKWONY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PERIS WAKESHO MAGHEMA ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS KALUYU MUNYANGA (LEGAL REPRESENTATIVES OF THE  
ESTATE OF BONIFACE MWAKIO KALUVU DECEASED) .... 2<sup>ND</sup> RESPONDENT**

**MACLEX MAKORI MAGABI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling relates to an application dated 27/9/2022 which sought for the following orders:-
  - a. Spent;
  - b. Spent;
  - c. That there be a stay of execution of the judgment and decree of this Honourable Court delivered on August 5, 2022 and the judgment of the learned Hon. C/. Nang'ea, Chief Magistrate in Mombasa CMCC No. 1215 of 2013 delivered on March 14, 2016 as upheld by this Honourable Court pending the hearing and determination of the appeal filed in the Court of Appeal.
2. The application was opposed through a replying affidavit dated 13/10/2022 and sworn by the Kioko Maundu, the counsel for the Respondents.



3. The application was disposed off by way of written submissions wherein both parties complied by filing detailed submissions together with various authorities in support of the parties' rival positions.

### **Analysis and Determination**

4. I have considered the said submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, there is only one issue for determination which is whether the Appellant has made out a case for grant of orders of stay pending hearing and determination of appeal preferred. Corollary to this finding is the issue of costs.
5. The principles for grant of stay of execution pending appeal are settled. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the [Civil Procedure Rules](#), 2010 which provides as follows: -

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

6. The power of a court to grant stay of execution is discretionary and just like any other discretionary power, the same must be exercised judiciously and not capriciously or whimsically. It must be recalled that the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of each of the parties to the dispute. In [RRW v EKW](#) [2019] eKLR, the Court of Appeal addressed itself on this issue as hereunder: -

“...The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award



of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent...”

7. Having settled on the principles, an interrogation of whether the Applicant has met the tests above is imperative. On substantial loss, the Applicant submits that the execution takes place, that is the release to the Respondents, of the security money which was deposited in a joint interest earning account, in the event the appeal is successful, the Respondents will not be in a position to refund the money as they have no known ability/ capacity to refund.
8. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the Court held that substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
9. On the other hand, the Respondents states that the application is premature as no steps have been taken to execute the judgment. Further, they submitted that the Applicant have not met the prerequisites for grant of stay of execution and that they have got no arguable appeal. This Court while balancing these two interests, must satisfy itself that that no party would suffer undue prejudice. The Court of Appeal in *Absalom Dova v Tarbo Transporters* [2013] eKLR while enunciating this principle stated as follows: -

“...The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”
10. It is my considered view that were this court to deny the Applicants an order for stay of execution, it would place them at a more prejudicial position than the Respondents. While it is unfortunate that the Respondents will have to wait a little bit longer to enjoy the fruits of their judgement, the Applicant has adequately demonstrated that they are likely to suffer loss in the event the appeal is successful and I so hold.
11. Lastly, the Applicant is required to furnish security to the Court as security for the performance of the judgment debt should the appeal fail. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“...The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose...”
12. In this case, security had already been given by depositing the decretal amount in a joint interest earning account. Nothing is at a loss as the interest is still accruing, and in the event the appeal is not successful,



the Respondents will not only have the decretal amount released to them but also the interest earned over the period of the appeal to this court and to the Court of Appeal.

13. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The application dated 27/9/2022 is merited and is hereby allowed on condition that the stay shall be operative for 45 days.
  - b. The Applicant to compile, file and serve a Record of Appeal within forty-five (45) days from the date hereof;
  - c. In default of either (b) above, the application dated 27/9/2022 shall stand dismissed;
  - d. Costs to abide the outcome of the appeal.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF JUNE, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of;**

Baya Advocate h/b for Onyango Advocate for the Appellants

Maundu Advocate for the Respondent

Guyo, Court Assistant

